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No. 80-292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VINCENT DELILLO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether the government may knowingly elicit unfavorable testimony from its own immunized witness and then be permitted to offer into evidence highly prejudicial and otherwise inadmissible tape recordings solely for the purpose of impeaching the unfavorable testimony previously elicited.

II. Whether the government may introduce prejudicial, inflammatory and otherwise inadmissible testimony seeking to implicate petitioner in a threat of bodily harm to explain inconsistencies which the government previously developed between the testimony of its two principal, immunized witnesses.

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IN THE

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No. _____

VINCENT DELILLO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VINCENT DELILLO, by his undersigned counsel, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

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[1] A separate petition for a writ of certiorari was filed on June 7, 1980, by David Francis, a codefendant in this case. *Francis* v. *United States*, No. 79-1927. No petition is being filed on behalf of the third defendant, Clearview Concrete Products Corp.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 620 F.2d 939.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1980. (App. B, *infra*). A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 1, 1980. (App. C, *infra*). The time within which to file the petition will expire on August 29, 1980, pursuant to revised Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

The relevant facts are simple and are fairly set forth in the opinion below. Defendants Vincent DeLillo, David Francis and Clearview Concrete Products Corporation ("Clearview") were indicted in the Eastern District of New York and subsequently convicted by a jury of defrauding the United States in violation of 18 U.S.C. § 371. The government's evidence against Clearview, much of which was not disputed, was that Clearview had through various fraudulent means and through various employees supplied substandard reinforced concrete sewer pipe to a federally-funded sewer project in Suffolk County, Long Island. The government's case against Vincent DeLillo, which was hotly contested on every significant factual issue, was that Vincent DeLillo, the then 22-year-old who ascended to the Presidency of Clearview when his father became seriously ill, had specifically authorized the former Clearview plant manager, Walter Gorman, and others to perform or to direct the fraudulent acts.

The government's chief witness was Walter Gorman,[2] whose extensive testimony implicated Vincent DeLillo, Francis and Clearview. Gorman's assistant at Clearview, Thomas Monahan, also testified as an immunized government witness, and he, too, admitted various criminal acts but did not directly implicate Vincent DeLillo; Monahan testified, in substance, that he took orders directly from Gorman.

At trial and on appeal defendant DeLillo objected to two critical evidentiary rulings. First, Monahan was asked during direct examination by the government whether he had overheard Vincent DeLillo instruct Walter Gorman to falsify an important quality control test on the pipe. Monahan acknowledged overhearing the conversation but denied that he heard Vincent DeLillo instruct Walter Gorman to falsify the test.[3] Over the defendant's vigorous objections, the trial court allowed the government to impeach Monahan's testimony by playing a portion of a tape recording between Gorman and Monahan in which Monahan, who was by his own admission intoxicated, agreed that

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[2] Gorman was a paid informant, admitting at trial that in exchange for his testimony he had already received from the government $25,00 in cash, and immunity in this case and in a separate case in which he had been recommended for prosecution for criminal tax fraud arising from a previous unrelated employment. Gorman's agreement with the government also provided for "an unspecified lump sum payment" after trial, which Gorman expected to be an additional $100,000. Tr. 1502-1511.

[3] Monahan's trial testimony did not come as a surprise to the government. Not only had the government been furnished with an affidavit which defense counsel took from Monahan, but, during a recess in the trial Monahan was examined by the government before the Court, under oath, in a closed courtroom for a half day prior to his trial testimony. Tr. 2366-2452. In that *voir dire* testimony, Monahan repeatedly denied overhearing Vincent DeLillo instruct Gorman to falsify the test.

DeLillo had given such an instruction. The trial court instructed the jury that the tape recording was only to be considered in assessing Monahan's credibility. The tape recording was the *only* testimonial evidence which corroborated Gorman's testimony against Vincent DeLillo.

Monahan was also asked by the government about a pre-indictment conversation in a car with Andrew DeLillo (Vincent's father, who was not a defendant in this case), Walter Gorman and Vincent Fradella, Andrew DeLillo's chauffeur.[4] Over defendants' objections, Monahan recounted a conversation in which Andrew DeLillo suggested that both Monahan and Gorman could modify their testimony and, if necessary, implicate Andrew DeLillo rather than Vincent. Monahan was not asked, and did not testify, about any threat.

Because of unrelated evidentiary difficulties created by the pretrial severance of a fourth defendant, Walter Gorman testified twice during the government's case-in-chief. During his first testimony, which lasted three days, he was not asked about the conversation in the car. Monahan then testified and, while he testified about the conversation in the car, his testimony contained no hint of a threat. Then, in the third week of trial — still in the government's case-in-chief — Gorman was recalled and, among other things, was asked by the government about the same conversation in the car. Gorman echoed Monahan's version, but added that Andrew DeLillo had threatened "[t]hat whoever this guy [the F.B.I. informant] is, if he hurts my son he will be looking over his shoulder for the rest of his life." The defendants immediately sought a mistrial, which the trial

[4] Gorman was at this time acting as an informant, apparently unknown to any of the other participants.

court denied.[5] The government emphasized the threat in closing argument, and Vincent DeLillo was convicted.

In the post-trial motions,[6] the defense sought a new trial based *inter alia* upon threat evidence. Applying the general balancing test in Rule 403, the Court found that the question was a "close one" but ultimately sustained the admission of the threat testimony. The trial court did not discuss any other issue raised in the post-trial motions.

A panel of the Court of Appeals affirmed the judgment of the District Court. The panel opinion held that the threat testimony was properly admitted because it was necessary to resolve "a credibility issue [which became] apparent to the jury." The panel opinion also rejected the argument that the impeachment of Monahan by the tape-recorded statement was improper. In neither case did the panel invoke the harmless error rule.

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[5] Although Gorman recorded on tape his recollections of the conversation in the car immediately afterward and was debriefed by the F.B.I. within days, none of the literally hundreds of pages of 3500 material contains any reference to the threat. The threat came as a total surprise to defense counsel and the Court.

[6] Since the government surprised the defense and the trial court with the threat testimony, the trial court could not issue a ruling on whether the testimony was admissible prior to the time that the jury heard it. The trial court's only decision was whether or not to grant a mistrial after three weeks of trial, or grant a new trial after five weeks of trial. Had the government apprised the Court in advance, a course of action seemingly approved in *United States* v. *Malizia* 503 F.2d 578, 580 (2nd Cir.), *cert denied*, 420 U.S. 912 (1975), the Court could have either excluded the testimony or devised a less prejudicial "solution" to the government-created "dilemma." The government's conduct in the manner and timing by which that threat evidence was offered, coupled with the absence of any reference to such evidence in the literally hundreds of pages of 3500 material made available, smacks of old-fashioned trial by ambush. Whether intentional or not, such conduct precluded consideration of any less prejudicial alternatives.

REASONS FOR GRANTING THE WRIT

The government's impeachment of Monahan with a hearsay tape recording and its introduction of the threat testimony deprived the petitioner of a fair trial in this case. This evidence introduced by the government raises important and as yet unresolved issues concerning the proper interpretation of the Federal Rules of Evidence. This evidence also raises an issue which directly implicates petitioner's right to a fair trial of the serious criminal charges brought against him by the government. In both the Monahan tape and threat testimony situations, the government introduced highly prejudicial evidence which would otherwise be inadmissible to impeach testimony *which the government itself had knowingly elicited in its case-in-chief*. The issues raised by such a practice are of sufficient importance on the daily functioning of the trial courts to warrant the granting of the petition for certiorari in this case.

1. The ruling of the trial court, affirmed by the Second Circuit, which permitted the government knowingly to elicit adverse testimony from Monahan and then impeach him with prior hearsay statements which would otherwise be inadmissible,[7] conflicts with the decisions from other Courts of Appeals. *See, e.g., Whitehurst* v. *Wright*, 592 F.2d 834 (5th Cir. 1979); *United States* v. *Shoupe*, 548 F.2d 636 (6th Cir. 1977); *United States* v. *Morlang*, 531 F.2d 183 (4th Cir. 1975); *Mississippi* v. *Durham*, 444 F.2d 152, 156 (5th Cir. 1971); *United States* v. *Michener*, 152 F.2d 880, 883, n.3 (3rd Cir. 1945). These courts have concluded that a party may *not* introduce adverse testimony and then rely upon the existence of that testimony to justify putting before a jury

[7] The government specifically conceded in the trial court that the tape recording was not admissible as direct evidence. Tr. 1919, 1921.

highly prejudicial and otherwise inadmissible evidence. Although several of these cases were decided prior to the effective date of Rule 607 of the Federal Rules of Evidence, which permits a party to attack the credibility of his own witness, it is by now well-established that Rule 607 was not intended to reverse the traditional rule that a party may not knowingly elicit adverse testimony in order to impeach the witness with prior hearsay statements. *See, e.g., Whitehurst* v. *Wright, supra,* 592 F.2d at 839; *United States* v. *Morlang, supra,* 531 F.2d at 190.

In addition, the procedure utilized by the government to introduce the Monahan tape recording constitutes a clear violation of Rule 403 of the Federal Rules of Evidence. Rule 403 provides that relevant, probative evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." As a matter of simple logic, the net legitimate effect of the government's introduction of adverse testimony and then impeachment of that testimony is to present absolutely *no* probative evidence to the jury. This is because the jury, if it heeds the trial court's limiting instructions concerning the impeachment evidence, cannot draw any inference favorable to the government. As Judge Friendly has recognized, "[t]he maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer. . . ." *United States* v. *Cunningham,* 446 F.2d 194, 197 (2d Cir.), *cert. denied,* 404 U.S. 950 (1971).

On the other hand, there is a substantial likelihood of unfair prejudice to the defendant if the jury disregards the limiting instruction regarding the tape recording, and considers the tape recording as substantive evidence. The Court has previously recognized that

the effect of cautionary instructions is subject to serious doubt. *See Bruton* v. *United States*, 391 U.S. 123, 135-37 (1968); *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Given an evidentiary sequence with literally zero probative value and a significant danger of unfair prejudice, the application of Rule 403 must, as a matter of law, result in the exclusion of the tape recording. The prejudice from this evidence was particularly acute since the tape recording was the *only* testimonial evidence corroborating the testimony which the paid informant, Gorman, gave against petitioner.

2. Certiorari should also be granted to review that portion of the Court of Appeals decision which, discarding a long line of its own prior cases which would have required the exclusion of this evidence, permitted the government to employ the same procedure to introduce highly prejudicial and inflammatory threat testimony. The government's presentation of evidence in its case-in-chief developed certain inconsistencies between the testimony of the government's two chief witnesses, Gorman — an immunized paid informant, and Monahan — an immunized witness. The government then purported to solve this apparent inconsistency by eliciting from Gorman, to the surprise of the defense and the Court, the death threat evidence described above.

Both the District Court in its order denying a new trial and the panel opinion of the Court of Appeals found that the threat evidence was admissible solely to explain the apparent conflict in the testimony. App. A, *infra.* at 9a-10a. Absent the apparent conflict in the testimony, it is clear that the threat evidence would not have been admissible since it had no independent probative value. *See generally*, *United States* v. *Check*, 582

F.2d 668 (2d Cir. 1978). The threat was not made during the period of the conspiracy or in furtherance of it, nor was the threat made by a party or on behalf of a party so as to amount to an admission. The powerfully incriminating threat evidence was therefore presented to the jury solely to solve a credibility conflict which the government had itself developed.

Allowing the government to "bootstrap" the testimony in this fashion is even more troubling here because testimony implicating a defendant in a threat[4] against a witness has long been recognized as the most inflammatory and prejudicial testimony which can be presented. The natural tendency is for the jury to convict the defendant for his involvement in the threat rather than the crime charged in the indictment. As the Second Circuit has itself held, evidence regarding threats to a witness "is *so prejudicial* that it should be excluded in the absence of exceptional circumstances." *United States* v. *Malizia*, 503 F.2d 578, 581 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975) (emphasis supplied).

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[4] Although the threat was actually made by Andrew DeLillo, the petitioner's father, its prejudicial effect clearly impacted on Vincent DeLillo. The threat was explicitly directed at anyone who testified against Vincent DeLillo, and the obvious tendency of this evidence was to suggest that the DeLillos were violent and dangerous men who would harm informers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 497-9—September Term, 1979.
(Argued: January 9, 1980 Decided: May 8, 1980.)
Docket Nos. 79-1327, 79-1341, 79-1342

UNITED STATES OF AMERICA,

Appellee,

v.

VINCENT DELILLO, DAVID FRANCIS, and
CLEARVIEW CONCRETE PRODUCTS CORPORATION,

Appellants.

Before:

LUMBARD, MOORE and MESKILL,

Circuit Judges.

One corporate and two individual defendants appeal from convictions to defraud the United States entered in the District Court for the Eastern District, Pratt, J.

Affirmed.

JOHN K. VILLA, ESQ., Washington, D.C. (Williams & Connolly, Washington, D.C. Raymond W. Bergan, Esq., and Bruce R. Genderson, Esq., of counsel), *for defendants-appellants Vincent DeLillo and Clearview Concrete Products Corporation.*

JAMES M. CATTERSON, JR., ESQ., Port Jefferson, N.Y., (Catterson & Nolan, Port Jefferson,

N.Y., of counsel), *for defendant-appellant David Francis.*

EDWARD R. KORMAN, United States Attorney for the Eastern District of New York (Thomas P. Puccio, Attorney-in-Charge, Organized Crime Strike Force, Eastern District of New York, of counsel), *for plaintiff-appellee.*

LUMBARD, *Circuit Judge*:

Three defendants appeal from their convictions, after a jury trial before Judge George C. Pratt in the Eastern District, for conspiracy from June 10, 1974 to June 26, 1978 to defraud the United States in violation of 18 U.S.C. § 371 in the construction of a federally funded sewer project in the southwestern portion of Suffolk County. The corporate appellant, Clearview Concrete Products Corporation ("Clearview"), was a major contractor and supplier of concrete pipe for the project; appellant Vincent DeLillo was chief operating officer of Clearview during the period in which the alleged fraud occurred, and appellant David Francis was a longtime employee of Clearview. The three appellants claim that various rulings by the trial judge entitle them to a reversal. We find no error in the conduct of the trial and affirm all three convictions.

Clearview, founded, owned and controlled by members of the DeLillo family, contracted with Lizza Industries, Inc., to supply approximately 97% of the concrete pipe needed for construction of the Suffolk County Southwest Sewer District Project, at a cost of approximately $20 million. Although they conceded at trial that Clearview engaged in numerous acts of fraud, including the conducting of rigged tests of the pipe it manufactured, the bribery of inspectors hired by consulting engineers, and the improper repair of pipes previously installed, the defendants argued that the frauds were committed at the instigation and under the supervision of Walter Gorman, a Clearview employee from June 1974 to November

Because there is no claim that the evidence was insufficient, a restricted summary of the facts will suffice. The fraudulent conduct in which Clearview engaged included the systematic rigging of hydrostatic and three-edge bearing testing of concrete pipe made by Clearview. There was copious and direct evidence, some gathered during a raid by F.B.I. agents at an actual test on June 26, 1978, that a three-edge bearing machine put together by Clearview and operated on Clearview's premises included the addition of a yellow valve, by which the actual amount of pressure being applied to the pipe under examination could be reduced without any reduction in the reading on the gauges visible to the inspectors. Defendant Francis, was detailed to operate the yellow valve in this manner and other Clearview employees were ordered to position their bodies during the tests in such a way as to block the inspectors' view of the yellow valve.

A second aspect of the defendants' conspiracy was the outright bribery of several inspectors. Gorman testified that Vincent DeLillo told him how much he, Gorman, was to pay out on Clearview's behalf to the inspectors. Thomas Monahan, a Clearview employee, corroborated Gorman's testimony in key respects on this issue, and some of the inspectors admitted accepted cash payments.

The third part of the conspiracy involved Clearview's efforts to conceal the results of its earlier misconduct. Having gotten the substandard pipe past the barrier of inspection, Clearview began to get reports, after installation, that major cracks were appearing in the pipe. Vincent DeLillo sent Clearview workmen to the scene to perform woefully inadequate, cosmetic "repairs". These repairs were performed surreptitiously — that is, Clearview gave no notice to county officials, and, with the connivance of the contractor Lizza Industries, the repairs were concealed from project inspectors.

On appeal, defendants Vincent DeLillo and Clearview press three grounds, each of which, they argue, constituted reversible error: First, the admission into evidence for im-

peachment purposes of testimony by Gorman that Andrew DeLillo, Vincent DeLillo's father, threatened both him and Monahan with retribution should either testify in a manner incriminating to Vincent DeLillo; second the admission of redacted portions of a tape recording of testimony Monahan gave to the grand jury, for the purpose of impeaching portions of Monahan's testimony at trial; and third, the trial judge's failure to give the jury any instruction on the relation, if any, between the surreptitious nature of the in situ repairs to Clearview's contractual obligations. David Francis raises several other issues: the allegedly incorrect ruling by the trial judge forbidding the demonstration of the three-edge bearing machine in the presence of the jury; the ruling by the trial judge that Francis' counsel's cross-examination of Gorman as to Gorman's prior bad acts could not extend to challenging Gorman's initial answers to such questions; the denial by the trial judge of two motions involving jury selection; and, finally, an alleged variance between the indictment and the proof adduced by the government at trial.

First, we address the question of the admission of Gorman's testimony about Andrew DeLillo's threat.[1] Initially, it may be noted that Andrew DeLillo was not indicted and did not testify. He was Clearview's founder and controlled it, although ownership had been dispersed among various members of the DeLillo family. In 1974, Andrew, because of ill-health, had turned over the presidency of the company to his son, Vincent, then twenty-two years old. Andrew resumed the reins after the F.B.I. "raid" on June 26, 1978.

We have already noted that Monahan (a Clearview employee who was a brother-in-law of Andrew DeLillo), also

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[1] Our analysis of the threat evidence in this case applies to the introduction of testimony of Andrew DeLillo's threat as it affected the case against Vincent DeLillo. Insofar as the threat came in against Clearview, of which Andrew DeLillo was president at the time the threat was made, the district court's ruling allowing the threat to come in as substantive evidence has not been challenged.

testified for the government, corroborating Gorman's testimony in important respects. But in some details Monahan's testimony differed from Gorman's and a pattern in these differences emerged — Monahan avoided implicating Vincent DeLillo in Clearview's illegal behavior. As the trial judge summed up the situation: "Monahan's testimony could have been viewed as having been carefully structured to insulate Vincent DeLillo from any involvement in the conspiracy."

The sequence of events immediately prior to the introduction of the threat evidence was as follows: After both Gorman and Monahan had testified on direct and cross-examination without mentioning the conversation in Andrew DeLillo's car in which the threat was made, the government recalled Monahan, who testified, among other things, that he had lied when he implicated Vincent DeLillo in the course of a tape-recorded conversation with Gorman which had been played to the jury. Monahan maintained that other portions of this conversation, damaging to Clearview but not to Vincent DeLillo, were true. The prosecutor then asked Monahan about a conversation with Andrew DeLillo in the latter's car, at which Gorman (along with Andrew DeLillo's chauffeur Vincent Fradella) had also been present. Monahan gave an account which did not include any testimony of a threat uttered by Andrew DeLillo. The government then recalled Gorman and asked him, again among other things, to give his account of the conversation with Andrew DeLillo. Gorman's version tracked Monahan's but included in addition testimony that Andrew DeLillo said "[t]hat whoever this guy [the F.B.I. informant] is, if he hurts my son he will be looking over his shoulder for the rest of his life." The defense objected to Monahan's testimony about the conversation and in its post-trial motion for a new trial urged that admission of the threat was so prejudicial that it should have been excluded under Rule 403 of the Federal Rules of Evidence.

Judge Pratt, in his post-trial memorandum denying the new trial motion, gave us an explicit account of his retrospec-

tive performance of the balancing required by Fed. R. Evid. 403, which reads in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .

We think there was no error in admitting Gorman's testimony regarding Andrew DeLillo's threat.

Appellants argue that our prior cases establish a principle that threat evidence cannot be introduced by the government except under "exceptional circumstances", which can be characterized as fair response to affirmative actions by the defense which "invite introduction of the threat evidence," *United States* v. *Malizia*, 503 F.2d 578, 581 (2d Cir. 1974). It is true that the fact patterns of some of our cases in this area fit this characterization. However, at no point has this Circuit ever held that the normal processes of Fed. R. Evid. 403 balancing be supplemented by an additional, iron-clad requirements that the defense "invite" threat testimony.

In our most recent case, *United States* v. *Check*, 582 F.2d 668 (2d Cir. 1978), in which we reversed a narcotics conviction, the entire discussion of threat evidence is described by the panel itself as dicta. 582 F.2d at 684-85. *Check* reviews prior cases and notes that in each of them "the government, in eliciting death threat testimony, was responding to an issue already broached by the defendant . . ."; and *Check* pointed out that "[t]he problem with the government's position in this regard is that the record clearly demonstrates that the government was not, in fact, *responding* to a previously raised defense argument. . . . ". 581 F.2d at 685-86. In any event, *Check*'s reasoning is inapplicable to the case at bar because of three additional facts present in *Check* and not present here. First, the death threat in *Check* was not a specific threat directed at a witness, whose introduction would thus serve the purpose of explaining a conflict in testimony. What the defendant said in *Check* was "that if he had any problems with anyone he wouldn't hesitate to shoot

them." How this statement was expected to bolster the credibility of the witness who offered the testimony, an undercover police agent, is unclear from the opinion in *Check*; presumably an undercover narcotics agent would not realize for the first time that his life was in danger when confronted with a statement of this kind reproduced above, and presumably such an agent would be less likely to alter his testimony in response to such a threat than an ordinary citizen. Moreover, the threat in *Check* was a generalized threat; a statement of the defendant's willingness to shoot anyone who crossed him, not focused on anyone in particular or on the fact that the recipient of the threat might testify in court. The generality of the *Check* threat counts against its usefulness in bolstering credibility and makes it more prejudicial in its possible effects on the jury. Second, the threat in *Check* was made by the defendant. In the case at bar the threat was not made by a defendant; since this circumstance distinguishes the case at bar from almost all our precedents, we will deal with it after our discussion of the cases. Third, the prosecutor in *Check* announced his intention to introduce the death threat in his opening statement, thus supporting the view that its introduction as a means of bolstering the credibility of the agent was a pretext.

Another recent case relied on by appellants is *United States* v. *Malizia*, 503 F.2d 578 (2d Cir. 1974). *Malizia* did not involve a threat directed toward a witness whose credibility was in question, because the reason the government sought to introduce evidence of death threats in *Malizia* was to explain the absence of one of its informants. As in *Check*, the actual threat involved was quite vague; all the government proffered was the hearsay tstimony that the informant was in fear for his life. Most important of all, in the case at bar the recipient of the threat, Monahan, was testifying on the stand and available for cross-examination as to whether or not the threat had been communicated to him and with what effect. (Indeed, the person who made the threat, Andrew DeLillo, was present in court throughout the trial and could have been

called). In *Malizia*, neither the recipient of the threat, nor the unidentified issuer of the threat, was available for cross-examination.

In *United States* v. *Rivera*, 513 F.2d 519 (2d Cir. 1975), the government was permitted to adduce proof that "unnamed third parties" threatened the life of a witness, in order to explain differences between his grand jury and trial testimony. This case is of particular interest since it conforms to the appellants' model of defense invitation (". . . a claim, vigorously developed by defense counsel in cross-examining [the government witness] . . .") and unlike the other cases discussed, does not involve a threat by the defendant. However, the trial court's admission of the threat testimony was affirmed in *Rivera*, and there is no language in the opinion to suggest that the circumstance of defense invitation was intended by the Rivera court to function as a *limit* on the acceptability of threat evidence in other cases.

In *United States* v. *Panebianco*, 543 F.2d 447 (2d Cir. 1976), we sustained the admission of evidence of a death threat where the defense cross-examined a government witness in such a way as to evince from her mention of a death threat. Although *Panebianco* would present no exception to the rule proposed by appellants in this case, it does not purport to set out the limits of the circumstances under which the government may be permitted to introduce death threat evidence. Like all our decisions in this area, it focuses upon the existence of confusing or contradictory testimony by a government witness which the government can explain if it is allowed to introduce evidence of threat. Moreover, the threat at issue in *Panebianco* was one made by the defendant.

In *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir.), *cert. denied*, 410 U.S. 989 (1972), we found no error in the admission of the testimony of a government witness that the defendant had threatened to kill him after cross-examination by the defense had established that his trial testimony differed from what he had told a grand jury. This court affirmed on

the broad ground that an "impeached witness may always endeavor to explain away the effect of [a] supposed inconsistency by relating whatever circumstances would naturally remove it." (quoting 3A Wigmore, *Evidence* § 1044 (1970)).

In *United States* v. *Briggs*, 457 F.2d 908 (2d Cir. 1972), we have an example of a case which falls outside the overly narrow rule appellants would have us adopt. In *Briggs*, the defendant denied having made death threats against a government witness, in response to questions put by the government on cross-examination. Despite the apparent absence of any defense "invitation", the trial judge allowed the agent to testify that the defendant had indeed threatened his life. We affirmed without any mention of a requirement that the defense do anything at all to trigger the government's ability to introduce threat testimony.

The question posed by the unusual fact pattern in the case at bar, then, reduces itself to whether or not the posture of testimony to the time the government sought to introduce evidence of Andrew DeLillo's threat was tantamount to impeachment of a witness. *See United States* v. *Cirillo*, 468 F.2d at 1240. We conclude that it was. The government's right to introduce threat evidence is not a matter that turns on the conduct of the defense. To allow it to do so would mean that the defense could by taking no action, profit from a contradiction in testimony between two government witnesses testifying on direct or redirect, as happened here. We can see no justification for such a restriction. *See United States* v. *Malizia*, 503 F.2d at 581 (quoting *Schumacher* v. *United States*, 216 F.2d 780, 788 (8th Cir. 1954), *cert. denied*, 348 U.S. 951 (1955)). If a credibility issue becomes apparent to the jury, the government should be afforded the opportunity to resolve it through the use of threat testimony — subject, of course, to the usual operation of the balancing test mandated by Fed. R. Evid. 403, to which we now turn.

All of our cases decided since the adoption of the Federal Rules of Evidence recognize that the central issue

when threat testimony is sought to be introduced is the balance of probativeness and prejudice required by Fed. R. Evid. 403. The importance of our concern with the government's need to introduce evidence of threats in order to help the jury resolve a credibility issue is a reflection of the fact that one element of this balance is probativeness. Of course, the balance between probativeness and prejudice will differ according to the purposes for which a piece of evidence is to be admitted. A death threat may be of very strong probativeness when it is directed against a witness and what is sought to be proved is that the witness' testimony was affected by it; and the prejudice is likely to be small because the jury will be instructed not to consider the threat on the question of the defendant's overall guilt. The prejudice is further reduced when, as in this case, the person who made the threat is not a defendant. There is a set of factors — the purpose for which the threat is sought to be admitted, the identity of the person making the threat — that a judge balancing under Fed. R. Evid. 403 must consider (although we do not mean these examples to be exclusive). We can say, and so hold, that the circumstances of which side makes what arguments and whose witnesses are involved, are irrelevant to this balancing, except insofar as they overlap with one of the factors mentioned above.

We turn now to the second major argument of appellants DeLillo and Clearview. Gorman's testimony included a statement by Vincent DeLillo that DeLillo did not care what had to be done to stop the pipes to be tested from leaking. Monahan's testimony about the conversation tracked Gorman's account but he denied that DeLillo said that he did not care what had to be done to achieve the desired result. The government then sought to introduce a tape recording of a conversation between Monahan and Gorman in which Monahan confirmed Gorman's version of DeLillo's statement. The trial judge admitted a redaction of the tape recording limited to Monahan's confirmation of Gorman's account of DeLillo's ordres, after performing a Fed. R. Evid. 403

balancing with regard to all the contents of the tape. Of course, what was ultimately admitted by the trial judge was limited in its use by the jury to impeachment purposes.

Appellants argue that the judge's ruling contradicts the purported rule that the government may not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony. As stated in *United States* v. *Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) "[i]mpeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before a jury evidence not otherwise admissible." *See also United States* v. *Rogers*, 549 F.2d 490, 497 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977). This, however, is the most *Morlang* can be said to stand for.

Beyond doubt, Monahan was not called to the stand by the government as a subterfuge with the primary aim of getting to the jury a statement impeaching him. Monahan's corroborating testimony was essential in many areas of the government's case. Once there, the government had the right to question him, and to attempt to impeach him, about those aspects of his testimony which conflicted with Gorman's account of the same events. *Morlang* itself explicitly recognizes the propriety of impeachment where it is "necessary to alleviate the harshness of subjecting a party to the mercy of a witness who is recalcitrant or may have been unscrupulously tampered with." 531 F.2d at 190. To the extent that defendants rely on *Morlang* for the principle that a witness cannot be put on the stand if the side calling him knows that he will give testimony that it will have to impeach, it seems clear to us that the effect of Fed. R. Evid. 607, codifying the right to impeach one's own witnesses without special restriction, is to nullify the plausibility of such a reading. The *Morlang* opinion itself recognizes that enactment of Fed. R. Evid. 607 might have such an effect. 513 F.2d at 189-90.

Appellants also argue that, *Morlang* aside, a proper balancing of prejudice and probativeness under Fed. R. Evid.

403 should have resulted in exclusion of the tape recording by the trial judge. Appellants argue that since evidence which, once introduced, can be used only for impeachment purposes cannot of itself contribute towards the proof of anything, the use of the tape recording could be assigned no probative value. This analysis neglects the fact that Monahan testified on many issues. The jury would have been justified in using the impeachment evidence with regard to Andrew DeLillo's conversation with Monahan and Gorman as an element in evaluating Monahan's overall credibility. Thus, introduction of the tape recording had probative value in that it may have enabled the jury to resolve conflicts in credibility with respect to other issues on which Monahan testified.

Any prejudice to Vincent DeLillo traceable to introduction of the tape recording must be considered minimal, since the evidence came in with a limiting instruction which, it must be assumed, was followed by the jury. *United States* v. *Briggs*, *supra* at 910. Moreover, appellants do not argue that there was any question as to whether or not Monahan actually made the statement sought to be introduced. Instead, they argue that he was intoxicated at the time and thus the statement was unreliable. That, of course, goes to the weight to be given to the statement and not its prejudicial effect. Additionally, we note that any possibility of undue prejudice[2] could have been offset by defense cross-examination of Monahan.

Finally, DeLillo and Clearview argue that the trial judge's failure to charge the jury as to the lack of any contractual obligation on Clearview's part to notify the authorities of repairs was reversible error. We disagree. The government did not argue that the surreptitious manner in

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[2] The prejudice resulting to defendants from the fact that introduction of the evidence was damaging to their case is, of course, not the kind of prejudice against which Fed. R. Evid. 403 protects defendants. *United States* v. *Briggs*, 457 F.2d 910; *United States* v. *Cirillo*, 468 F.2d at 1240.

which Clearview's in situ repairs on the pipes were carried out violated Clearview's contract, nor did the government argue that had the contract been violated such violation would be a basis for finding the defendants guilty. The government simply argued that the manner in which the "repairs" were performed was contrary to industry practice and was evidence of the defendant's criminal intent. Under such circumstances, there was no need for the judge to instruct the jury that Clearview's contract did not require it to give notice of in situ repairs.

We come now to a series of points raised on appeal by defendant David Francis. None of these have merit. First, Francis argues that it was error for the trial judge to deny him an opportunity to demonstrate the operation of the three-edge bearing apparatus in the presence of the jury. But the discretion committed to the trial judge in supervising jury-viewed demonstrations is broad, and in this case Francis' attorney at trial did not object to the performance of the test outside the presence of the jury. Francis' expert, moreover, was allowed to testify about the results of his operation of the machine outside the jury's presence, and Fancis has advanced no serious argument that the judge's ruling on this matter prejudiced him.

Second, Francis argues that the trial judge erred in ruling that although his lawyer could ask Gorman questions about Gorman's prior bad acts, Gorman's answers wre not subject to a secondary level of impeachment. Rule 608(b) of the Federal Rules of Evidence commits the decision to impose such a limit on bad act impeachment to the discretion of the trial judge, which we decline to overrule.

Third, Francis argues that the district court erred in rejecting his blanket challenge to all potential jurors who lived in the geographical area to be served by the Suffolk County Southwest Sewer District — an area embracing 20% of the county's population. In light of the trial judge's entirely proper handling of the question of preconceived juror opinions

on the case, there was no abuse of discretion in his denial of Francis' motion.

Finally, Francis argues that a fatal variance arose between his indictment, which charged that a single conspiracy to defraud the United States had been carried out by defendants, and the proof adduced by the government at trial, which — Francis claims — showed the existence of multiple conspiracies. Francis' involvement in the conspiracy was limited, as the prosecutor conceded in his closing statement, to knowing participation in the rigging of concrete pipe tests. But it is well-settled that when "a conspiracy had multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that appellant agreed to acccomplish at least one of the criminal objectives." *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). The government presented overwhelming proof at trial of a conspiracy directed towards the systematic defrauding of the United States through the improper production and testing of concrete pipe, aided by the bribery of inspectors and the performance of repairs meant to conceal rather than correct. There was abundant evidence that Francis particapted in the fraudulent testing and thus his variance argument has no force.

The convictions are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of May one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. THOMAS J. MESKILL
HON. LEONARD P. MOORE
Circuit Judges,

UNITED STATES OF AMERICA, *Plaintiff—Appellee,*

v.

VINCENT DELILLO, DAVID FRANCIS, *Defendants,*

VINCENT DELILLO, DAVID FRANCIS AND CLEARVIEW CONCRETE PRODUCTS CORPORATION, *Defendants—Appellants*

Filed May 8, 1980

Nos. 79-1327
79-1341
79-1342

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of the court.

A. DANIEL FUSARO,
Clerk

/s/ EDWARD J. GUARDARO
by: Edward J. Guardaro,
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of May one thousand nine hundred and eighty.

Present: HONORABLE THOMAS J. MESKILL
HONORABLE J. EDWARD LUMBARD
HONORABLE LEONARD P. MOORE
Circuit Judges,

UNITED STATES OF AMERICA, *Appellee,*

v.

VINCENT DELILLO, *Appellant.*

Filed July 1, 1980

No. 79-1327

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AT a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA, *Appellee,*

v.

VINCENT DELILLO, *Appellant.*

Filed July 1, 1980

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ WILFRED FEINBERG
Chief Judge

see 969

969 27